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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 523

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY G. SCHMIDT, as Trustees, of THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Petitioners*,

v.

JOHN KOSTY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John L. Lewis, Henry G. Schmidt and Josephine Roche, Trustees of the United Mine Workers of America Welfare and Retirement Fund (hereinafter sometimes referred to as the "Trustees" and the "Trust", respectively), Petitioners, pray that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit in which judgment was entered May 23, 1963, and petition for rehearing *en banc* denied July 15, 1963.

A certified Appendix record in this case, together with the proceedings of the Court of Appeals, is furnished herewith, in accordance with the Rules of this Court.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is unreported and is printed in the Appendix to this petition (page 1a). The opinion of the United States Court of Appeals for the District of Columbia, printed in the Appendix hereto, (p. 3a), is reported at 319 F. 2d 744. The Court of Appeals denied the petition for rehearing (R. 135) by an order *Per Curiam* without opinion (App. 35a; R. 174).*

JURISDICTION

The judgment of the Court of Appeals was entered May 23, 1963 (R. 134). Petition for Rehearing En Banc or in the alternative by the Division was timely filed and denied by the court on July 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err by ruling that trustees of a welfare and retirement trust fund created in accordance with the Labor Management Relations Act of 1947, as amended, must give notice to prospective beneficiaries of proposed amendments to eligibility requirements thereunder when it was conceded by the same court that the Trustees were vested with the discretion to promulgate and modify such requirements and the Trust Instrument did not require such notice?

2. Did the Court of Appeals err in considering *sua sponte* notice to prospective beneficiaries as a condition precedent to Trustees' modification of eligibility requirements without first remanding the case to the District Court to afford Trustees the opportunity to present evidence to demonstrate the basis of the change in eligibility requirements?

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* The abbreviation "App. —" refers to the Appendix to this Petition. The abbreviation "R. —" refers to the certified record of this case filed with the Clerk of this Court.

3. Did the Court of Appeals err by directing the District Court to enter judgment for respondent when neither the Trustees nor the District Court had passed upon whether respondent had completed the requisite 20 years of employment in the bituminous coal industry, such always having been a condition of eligibility?

4. Did the United States Court of Appeals act properly by deciding defenses as to statute of limitations and laches to an action where the District Court specifically did not rule thereon and none of the parties to the action had briefed or argued the issues before the Court?

STATUTES INVOLVED

The statutory provisions involved are Labor Management Relations Act, 1947, Section 302(c)(5) [29 U.S.C., Section 186(c)(5), 61 Stat. 157], and Title 12, Section 201, District of Columbia Code. They appear in the Appendix hereto, pp. 32a and 34a, respectively.

STATEMENT OF THE CASE

On March 22, 1960, respondent, a coal miner, instituted a civil action in the United States District Court for the District of Columbia for judicial review of a decision by the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 denying his application for a pension (R. 2).

On March 5, 1950, coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 and the United Mine Workers of America, a labor union, as settlors, created a discretionary trust, of which petitioners are trustees, within the framework of Section 302(c)(5) of the Labor Management Relations Act, 1947. [Title 29 U.S.C. Section 186(c)(5)] (App. 32a).

By the terms of the Trust Indenture, the settlors granted to the Board of Trustees, whose duty it was to administer this trust, the following specifically enumerated broad and encompassing discretionary powers (App. 16a; R. 40):

> "Subject to the stated purposes of this Fund, *the Trustees shall have full authority*, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, *with respect to questions of coverage and eligibility*, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, *and all other related matters.*" (Emphasis added)

On April 5, 1950, the Trustees, acting pursuant to that authority established by Resolution 10 (App. 19a; R. 42) the following eligibility requirements for a pension, each of which must be unequivocally met before a pension can be awarded:

> "An applicant shall be eligible for a pension if he meets the following requirements:
>
> A. Attained the age of sixty (60) years or over at the time of his application for pension.
>
> B. Retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946.
>
> C. Been employed for a period of at least one year in the Bituminous Coal Industry immediately preceding his retirement.
>
> D. Completed twenty (20) years service in the Coal Industry in the United States, its possessions or territories, or the Dominion of Canada . . ." (App. 20a: R. 43).

This Resolution further provided that it would be ". . . subject to amendment, revocation and revision at the discretion of the Trustees" (App. 24a; R. 43).

On January 29, 1953, the Trustees annulled Resolution 10 and adopted Resolution 30 which was effective on that date and provided, among other things, that an applicant for a pension must have completed twenty years service in the coal industry within the twenty-five years immediately preceding his application for a pension (App. 23a; R. 46). On March 13, 1953 the Trustees amended Resolution 30, by broadening and enlarging this requirement, stating that an applicant must have completed twenty years service in the coal industry within the thirty years immediately preceding his application for a pension (App. 27a; R. 50). This amendment was made retroactive to January 29, 1953.

Respondent retired from the coal industry by permanently ceasing work on June 26, 1953. He filed an application for a pension which was denied by the Trustees on August 7, 1953, on the grounds that he did not meet the requirements of Resolution 30, as amended in that he did not have twenty years of completed service in the coal industry within the thirty years immediately preceding his application for a pension (R. 52). In this regard respondent testified that in December, 1952 (prior to the amendment of eligibility requirements) he had been told by an officer of his local union that the regulations had been changed and was advised to make his application so he would be "sure" of being eligible.[1] Respondent, however, did not retire until after the amendments took effect, to wit, June 26, 1953 and did not file his application until July 7, 1953 (R. 53).

Respondent insitituted this action six and one-half years later (R. 2).

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[1] This appears in the typewritten transcript of the proceedings in the District Court, page 43.

The District Court held that respondent had not completed twenty years' service in the coal industry within the thirty years immediately preceding his application for a pension as required by the resolution in effect at the time of his retirement. The District Court further found that respondent was not eligible for a pension under the prior Resolution 10 because he had not retired and had not made application for a pension while the resolution was in effect as explicitly required by Trustee regulations. The Court's opinion reads:

> ". . . The defendants denied plaintiff's application for pension on the grounds that he was not eligible for a pension in that he had not completed 20 years service in the coal industry within the 30-year period immediately preceding his application for pension . . . the Court finds and concludes from that evidence and the other evidence presented at the trial that there is substantial evidence to sustain the decision of the Trustees."
>
> * * *
>
> ". . . The Court concludes that at the time of the amendment of the eligibility rules, *plaintiff was not eligible for a pension in that he had not retired fro[illegible] or ceased work in the bituminous coal industry as required by the eligibility rules before amendment.*" (Emphasis supplied) [App. 1a-3a; R. 8-9].

The District Court made no finding of fact with respect to respondent's employment prior to 1923, that being the date of the commencement of the thirty years period as set forth in Resolution 30 as amended. Likewise, the Trustees had made no investigation of respondent's employment prior to 1923 for the same reason. No evidence was introduced by the Trustees in this regard. They conceded twelve years of completed employment in the coal industry within the thirty

years immediately preceding his application for a pension.

The Court of Appeals acknowledged that the scope of judicial review in this case was limited to a determination as to whether the Trustees had acted arbitrarily and capriciously with regard to respondent. It also conceded and recognized "that the trustees have been accorded wide latitude in specifying from time to time what the eligibility qualifications shall be," (App. 9a; 319 F. 2d 748) including the "authority . . ./to revise pension eligibility requirements in the light of their experience." (App. 11a; 319 F. 2d 748) The Court, however, reversed the judgment of the District Court without evidence of the reasons for or reasonableness of Trustees' action, holding that the changing of the requirements of eligibility by the Trustees without a general prior notice of intent to make such changes constituted arbitrary and capricious action by the Trustees (App. 11-12a; 319 F. 2d 749).

The Court of Appeals further ruled that the plaintiff's application was to be considered under Resolution 10. It did not remand the case to the District Court or to the Trustees for initial review in this regard. Instead the appellate court upon the limited record below ruled that respondent was eligible for a pension retroactive to the date of his retirement (App. 13a; 319 F. 2d 749).

The Court of Appeals also rejected the defense of laches as not being applicable to the case.[1a] It then dispensed with the defense of the statute of limitations on the basis that the Trustees continued to review respondent's application, there being no final rejection

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[1a] This issue was neither argued nor briefed before the District Court, nor in the Court of Appeals. *Further, it was an issue not decided by the District Court.*

of plaintiff's application until the filing of the answer herein.[2]

On June 7, 1963, Trustees filed a Petition for Rehearing En Banc or in the Alternative by the Division, which was denied on July 9, 1963 (App. 35a; R. 174). This Petition seeking review of the adverse rulings herein stated followed.

REASONS FOR GRANTING THE WRIT

INTRODUCTORY: COMPARISON OF THE OPINIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS

The Court of Appeals held that the Trustees were arbitrary and capricious as a result of changing pension regulations without notice to potential beneficiaries. However, nowhere in its opinion did the District Court expressly deal with the subject of notice. The District Court dealt solely, and Trustees submit properly, with determining whether the Trustees were arbitrary and capricious by determining that the respondent had not met Trust Fund pension regulations. It ruled the Trustees were not arbitrary and capricious in deciding that respondent had met neither the eligibility requirements of Resolution 10 when that Resolution was in force, nor the eligibility requirements of Resolution 30 which was in effect when respondent retired and applied for a pension (App 2a).

Since respondent met neither the eligibility requirements of Resolution 10 nor of Resolution 30 when they

[2] This issue similarly was not briefed or argued in the District Court nor in the Court of Appeals. *Similarly, the District Court did not adjudicate the issue.* Moreover, the Trustees' administrative file introduced below as Defendants' Exhibit 3 reveals plaintiff's pension application was rejected on August 7, 1953, and all subsequent action by the Trustees, including voluminous exchanges of correspondence with plaintiff and others, was consistent with such rejection.

were respectively in force, the District Court found it unnecessary to reach the question of notice. By contrast, the Court of Appeals did not concern itself so much with the attainment of eligibility requirements by respondent as with the necessity for notice. The Court of Appeals appears to have assumed that the respondent met the requirements of Resolution 10; doing so by equating "permanently ceasing work", as required therein, with the proposition that respondent "could have qualified" by a simple election to stop working or that "all that is lacking is the actual termination of employment" (App. 10a; 319 F. 2d 748).

Accordingly, the difference between the opinions of the District Court and the Court of Appeals is a simple one: The District Court found respondent did not meet the explicit requirements of Resolution 10 since he had not "retired by permanently ceasing work" during the period of its effectiveness, while the Court of Appeals found respondent had in effect substantially complied with Resolution 10 (App. 1a, 13a; 319 F. 2d 749).

Factually, it cannot be disputed that respondent was ineligible under Resolution 10 for respondent had not retired by "permanently ceasing work" in the industry during the time when Resolution 10 was in force. Trustee regulations are clear and explicit. "Permanently ceasing work" means just that, the same as the "age of sixty" means the 60th birthday, not the 59th birthday; or the same as being employed "one year immediately preceding his retirement" means 12 months next preceding his retirement; or the same as completion of "20 years of service" means 20 years, not 19 years. Accordingly, it appears that the District Court's conclusion is logically correct because its factual premise is sound.

1. This Petition Presents a Case of First Impression to This Court Governing the Scope of Permissible Authority Which Can Be Delegated By Settlors to Trustees of a Welfare Trust Fund Created by a Collective Bargaining Agreement in Accordance With Section 302(c) of the Labor Management Relations Act, 1947, as Amended

The importance of this case as legal precedent to guide the administration of the instant Trust, as well as to the future establishment and administration of similar welfare trust funds created pursuant to Section 302(c) of the Labor Management Relations Act, 1947 (Title 29 U.S.C. Section 186(c)), cannot be overstated, for it runs to the heart of the powers which can be bestowed upon and exercised by trustees of a welfare trust created pursuant to that section.

At the outset, it is important to distinguish the case now presented from a case where trustees are claimed to have acted contrary to the powers granted to them by the trust agreement, contrary to their own rules or contrary to the Labor Management Relations Act, 1947. No such issues are involved here. Similarly, the instant petition does not question whether eligibility requirements can be modified after an applicant has met previously existing requirements, nor does it reach the issue of notice to applicants who have previously qualified.

The issue raised here is whether the Trustees, in the exercise of their discretion, can lawfully amend eligibility requirements without first giving notice to *prospective beneficiaries* who had not qualified prior to the date of the amendments.

Prior to the instant decision, the right of an employee of one of the bituminous coal operators signatory to the Agreement to receive a pension from the

Trust was governed by the eligibility requirements in effect at the time of filing of his application. *Dauti v. Lewis* (D.C. Cir., 1962) — U.S. App. D.C. —, 312 F. 2d 345. And, while a pensioner, once having had his pension application approved, is not affected by later amendments of the eligibility requirements, he has no perpetual rights in the Trust since all pensions as a class can be reduced or eliminated by the Trustees if the financial condition of the Trust so warrants.

The Court of Appeals has now ruled in essence that amendments to eligibility requirements are not valid as to prospective beneficiaries who are capable of meeting the earlier standards, but have not elected to do so, unless they had been given advance notice or a grace period. Since the Trustees have no way of knowing in advance what a prospective applicant's particular status might be, or who among the prospective beneficiaries might elect to retire and apply for a pension, the limitation thus imposed requires, as an empirical reality, that advance notice be given by the Trustees to all employees of coal operators signatory to the Agreement prior to any amendments of eligibility requirements if such amendments are to be fully effective.[3]

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[3] In this regard, the appellate court stated:

"We do not say that actual notice to each employee of his opportunity so to elect would be necessary to defeat a claim, since there may be problems of identification and communication which the Trustees may not be able to overcome in every case, although no point of this kind is made on their behalf in the record of this case. We do say that it was clearly not beyond the capacity or resources of the Trustees to have devised some system of publicity for the impending change which reasonable men would regard as having fulfilled their fiduciary undertakings." (App. 11a, 319 F. 2d 749)

No such limitation is found or even remotely suggested by the trust instrument, nor is there any suggestion that the settlors of this trust, namely, the Union and signatory coal operators, desired to impose such a limitation. To the contrary, the settlors clearly and unequivocally granted complete discretion in the Trustees with regard to eligibility requirement (App. 16a; R. 40).

Further, since it is conceded by the Court of Appeals that the Trustees have the power pursuant to the Agreement to establish and modify not only eligibility standards but also the amount, if any, of the pensions, it is difficult to comprehend why modifications of eligibility requirements made effective as of the date of their pronouncement are invalid, at least, insofar as mere prospective beneficiaries are concerned.

It has long been established that legislation takes effect as of the date of its enactment unless it or another statute or constitutional provision provides that another date shall apply.[4] *Matthews* v. *Zane et al.* (1822) 7 Wheat. 164, 5 L. ed. 425; *Lapeyre* v. *United States*, (1873) 17 Wall. 191, 21 L. ed. 606. And, as this Court said in *Ruppert* v. *Caffey*, (1920) 251 U.S. 264 at 301, 64 L. ed. 260 at 276:

> "... Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be

[4] Nor is legislation considered retrospective in operation because it may be dependent upon facts arising prior to enactment. *Savorgnan* v. *United States* (7 Cir., 1949) 171 F. 2d 155, aff'd 70 S. Ct. 292, 338 U.S. 491, 94 L. ed. 287; 15 A.L.R. 2d 538; rehearing den. 70 S. Ct. 564, 339 U.S. 916, 94 L. ed. 1341 (loss of citizenship); *John McShain Inc.* v. *District of Columbia* (D.C. Cir., 1953) 205 F. 2d 882, 92 U.S. App. D.C. 358, cert. den. 74 S. Ct. 227, 346 U.S. 900, 98 L. ed. 400 (imposition of tax).

imposed rests wholly in the discretion of the law-making body."[5]

There is also evidence that Congress itself felt that the discretion and right of immediate action conveyed to Trustees in this regard was proper. Thus, the Douglas Committee's Report[6] recognized that "eligibility conditions . . . have been changed a number of times"; as a result "a considerable number of persons" were denied pensions "who would otherwise have been eligible under the former requirements"; and that "the mounting costs of the pension program required some tightening up of eligibility conditions." (App. 30-1a) It is significant that the remedial legislation which followed did not require that notice of proposed changes in eligibility requirements be given to persons who "would otherwise have been eligible" prior to the effective date of such amendments.[7]

The District Court for the Western District of Pennsylvania has aptly questioned the advisibility of extending judicial surgery of this Trust to encompass such discretionary aspect, noting:

> "It is not the province of the court to whittle away the purport and tenor of a trust created by authority which stems from Act of Congress, 29

[5] See also *Spokane Hotel Co.* v. *Younger* (1920) 113 Wash. 359, 194 P. 595 (wherein the Supreme Court of Washington held that notice was not a prerequisite to validity even though hardship might result).

[6] *Welfare and Pension Plans Investigation, Final Report submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended by S. Res. 200 and S. Res. 232 (84th Congress)* (App. 28a).

[7] Title 29, U.S.C. Section 301 et seq.; Title 29, U.S.C. Section 401 et seq.

U.S.C.A. Sec. 186(c). Where deviation might exist from regulations adopted by the Trustees, the remedy lies against the Trustees for violation of said trust, and where regulations are deemed unjust, the remedy must lie with Congress. For the courts to interject themselves in the fragile and delicate operations of a trust which requires expertise knowledge of trustees who have been selected for their know-how and familiarity with the inner workings of a vast and complex pension program, would prove inimical to the best interests of the trust and the employees for whose benefit it was created." *Kough* v. *Lewis* (D.C., W.D. Pa., 1961) 195 F. Supp. 657, 658.

Petitioners submit that the following principle laid down in *Shelton* v. *King* (1913) 229 U.S. 90 at 94-95, 57 L. ed. 1086 at 1088 should control here:

"... It is a settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting bona fide. To do so would be to substitute the discretion of the court for that of the trustee. Upon the same and even stronger grounds a court of equity will not undertake to control them in violation of the wishes of the testator. To do that would be to substitute the will of the chancellor for that of the testator. Lewin, Trusts, 2d Am. ed. 448; Nichols v. Eaton, 91 U.S. 716, 724, 23 L. ed. 254, 256."

The impact of the decision of the Court of Appeals as an unwarranted intrusion upon the discretionary functions of the Trustees cannot be avoided by stating that the court was not concerned with "*what* the qualifications should be", but rather with "*how* changes are to be made" (App. 9-10a; 319 F. 2d 748). This is a meaningless distinction, for the Court in essence has nullified the amendment made by the Trustees with

regard to all potential beneficiaries who might have been able to retire and establish their eligibility as of January 29, 1953. The Court's opinion is at variance with the trust instrument and substitutes the Court's discretion for that of the Trustees.

2. The Court of Appeals Should Have Remanded the Case to the District Court to Enable the Trustees to Evidentially Demonstrate the Sound Basis for the Change of Pension Regulations Without Notice to Potential Beneficiaries Before Ruling That Such Change Without Notice Was Arbitrary and Capricious and Causing the Oppressive If Not Intolerable Financial and Administrative Burden to the Fund

As indicated above, the Court of Appeals without factual foundation found the Trustees to have been arbitrary and capricious because no prior notice of pension regulations changes was given to potential beneficiaries, while neither the requirement to give notice nor the reasons for the change of regulations without notice were considered by the court below, nor does such mandate appear in the Trust Indenture.

The motivating circumstances must be considered in conjunction with the Trustees' exercise of discretionary powers bestowed upon them by the Trust Instrument. Indeed, the Court of Appeals was not oblivious of the fact such motivations should be considered when it acknowledged that the Trustees have authority "to revise pension eligibility requirements in the light of their experiences". The court recognized "[F]lexibility . . . seems essentially necessary for the operation of this Fund tied as it is to the fluctuating fortunes of the Coal Industry" and that "trial and error" in "trust relationship . . . are involved" (App. 11a; 319 F. 2d 748-9). While it held that such flexibility must "operate within some limita-

tion of fundamental fairness," (App. 11a; 319 F. 2d 749) the same "fundamental fairness" applied to the Trustees and the Fund beneficiaries requires a thorough review of all facts forming the foundation for Trustees' action. Yet the Court of Appeals, void of factual foundation, went on to find the Trustees arbitrary and capricious for changing pension eligibility requirements without notice to potential beneficiaries. Certainly it cannot be properly said by any court that such action by the Trustees in and of itself is arbitrary and capricious *per se*, since many factors, circumstances, motivations, experiences and general trustee expertise could make it expedient if not mandatory that the regulations in good faith be changed without notice. A thorough review and evaluation of all facts forming the foundation for Trustee action must be made. It well could be, and we say here it was, necessary to make such changes in trustee regulations without notice in order to carry out the legal and fiduciary obligation imposed upon the Trustees to protect the trust res, assure sound fiscal policy in relationship to revenue and expenditures and also assure efficient and effective administration of this inter vivos trust fund.

The Douglas Committee Report sounded one of the main reasons for the without notice change in pension regulations when it cited that "the mounting costs of the pension program required some tightening up of eligibility conditions." That report states:

> "The eligibility conditions for pensions have been changed a number of times. An important change was made in 1953. . . . In 1953 these conditions were changed to require that the 20 years of services must have been within the 30 years preceding retirement, and that the applicant must have been

regularly employed in a classified job immediately prior to May 29, 1946.

"These changes have caused a considerable number of persons to be denied pensions who would otherwise have been eligible under the former requirements. (As indicated above, approximately a third of all denials in the 1955 fiscal year were on the ground that the applicant had not been employed in the industry immediately prior to the inception of the fund.) The main reasons for these changes were that the fund was finding that many individuals who had retired or had left the industry prior to May 29, 1946, were obtaining temporary employment as miners only to qualify for pensions, and the mounting costs of the pension program required some tightening up of eligibility conditions." (App. 30-1a)

There were other factors to consider which affected sound fiscal policy. There were "pension mills" or synthetic so-called coal mines set up to supply pseudo employment to ostensible coal miners to enable qualification for Trust Fund pension though such individuals had long been absent from the coal industry. Other former miners who had left the coal industry during World War II and the Korean conflict for more remunerative war industries were attempting to return to the coal industry solely for one year's employment so as to qualify for a pension. Were the change not immediately made, therefore, these individuals would have easily caused pension costs to reach or possibly exceed an estimated yearly cost of $100,000,000 that statistical information available to the Trustees at the time of the January, 1953 change predicted they might.

It is not necessary to labor the obvious. The Trust could not tolerate this drain, even for a limited period

if it were to endure. Of necessity, the amount of pensions payable to existing pensioners would have to be drastically reduced and severe hardships upon existing pensioners who have adjusted their living to the existing rates were bound to follow. In this regard, it should be remembered that the Trustees have a duty to act not only in the best interests of possible potential beneficiaries but also to protect the best interests of existing pensioners and conserve the trust res. It must be remembered that once adopted, the new regulations must be uniformly applied and no exception to them may be made for any individual.

The obvious purposes of the change in eligibility requirements, therefore, were to preserve the financial integrity and stability of the Trust and assure sound administration. Thus, what appears to have been arbitrary and capricious conduct towards a single individual may at the same time reflect and represent beneficent and well deserved consideration toward all beneficiaries. Except for a statement of these principles in their petition for rehearing before the Court of Appeals, the Trustees here have been given no opportunity to present the basis for their action.

3. The Court of Appeals Erroneously Ordered the District Court to Enter Judgment for Respondent When Important Facts Bearing on Entitlement Had Not Been Considered by Either the District Court or the Trustees Because of Their Resolution of the Case on a Principle of Law Later Repudiated by the Court of Appeals

The Trustees, under the duties imposed upon them by the Agreement, clearly had the right, and indeed the obligation, to pass upon qualifications of applicants for a pension. *Szuch* v. *Lewis* (DC., D.C. 1960) 193 F. Supp. 831 at 835. And where new facts relating to an applicant who sought a pension have arisen;

the courts have remanded these issues to the Trustees, after determining the controlling issues of law, so that the Trustees can perform their functions. See *Harper* v. *Lewis* (DC., D.C. 1960) 186 F. Supp. 285; *Ruth* v. *Lewis* (DC., D.C. 1958) 166 F. Supp. 346.

Here the Trustees did not pass upon whether respondent had been employed 20 years in the industry, which was one of the criteria even under the original requirements which the Court of Appeals said must govern the instant case. Instead, the Trustees considered respondent's employment in the industry only from 1923 forward, that is, the period 30 years prior to respondent's employment. This was the test the Trustees believed to be applicable. For this reason the Trustees did not introduce any evidence or even check on respondent's employment for the 20 year period requirement, which was partially dependent upon alleged employment in the industry prior to 1923.

The trial court similarly, in its disposition of the case, found no occasion to pass upon this fact. The Court of Appeals, however, apparently ignored this situation and held that in view of respondent's testimony that he had worked for 20 years in the industry, which as stated above was not controverted, he was entitled to a pension, and ordered the District Court to enter judgment accordingly. In essence, the Court of Appeals has heard but one side of this important facet of the case—this because of the misconception of both the Trustees and the trial court as to the standards to be applied.

This Court, in *Marconi Wireless Tel. Co.* v. *Simon* (1918) 246 U.S. 46, 38 S. Ct 275, 62 L. ed. 568, in a similar situation, held that:

"It follows, therefore, that to finally decide the case would require us to determine whether or not the apparatus as furnished was a direct infringement or mere contribution. But to do this would call for the exercise on our part of a duty which it was the province of the court below to perform, and which doubtless it would have performed but for the error into which it fell concerning the interpretation of the Act of 1910, . . .

* * *

"Our order, therefore, will be one reversing the decrees of both courts below and remanding to the District Court, to the end that, in the light of the construction which we have given the Act of 1910, the rights of the parties may be considered and determined.

"Reversed and remanded." (246 U.S. at 57, 58; 62 L. ed 573, 574)

Likewise in *Szuch* v. *Lewis* (DC., D.C. 1960) *supra*, the trial judge recognized that such determinations as to eligibility rest upon the Trustees and not the courts (193 F. Supp. 835):

"Upon plaintiff's application for a pension they exercise their discretion to interpret the scope of one of these requirements. Their interpretation of the clause, "employed in the Bituminous Coal Industry," was such that plaintiff's status did not fall within the requirement. There is no evidence they acted in bad faith, arbitrarily or capriciously. The fact that the Court might interpret this term in a broader sense has no bearing, since it is the discretion of the trustees that controls."

Petitioners do not dispute the authority of the Court of Appeals or this Court to take such appropriate action "as may be just under the circumstances." *Tinder* v. *United States* (1953) 345 U.S. 565, 73 S. Ct. 911, 97 L. ed. 1250. Petitioners do say, however, that under

the circumstances of this case, and in accordance with the *Marconi* and *Szuch* decisions, *supra*, justice is not served by allowing the Court of Appeals to determine facts as to eligibility to a pension from the Trust, when neither the trial court nor the Trustees have passed upon a salient point of eligibility due to their conception of the law.

4. The Court of Appeals Imposed a Binding Precedent on Petitioners, With Respect to the Defenses of Laches and the Statute of Limitations, Without the Trial Court Having Passed on the Issues, and Neither Petitioners Nor Respondent Ever Having Briefed or Argued These Points

Each year similar actions for pensions are instituted. In a majority of the cases the suits are commenced more than three years after the Trustees' denial of the pension application. This Fund, like many other similar organizations, operates upon principles of statistics. It is detrimental to the welfare of the Trust and existing beneficiaries to permit an applicant to sleep on his rights for an extended period and then obtain a retroactive pension. In the instant case, according to the judgment of the Court of Appeals, respondent will receive a retroactive pension of ten (10) years.

Had the opportunity been available, petitioners would have advanced a concept that an action for a pension is divisible into two parts. In considering a similar problem, the Supreme Court of Colorado, En Banc, said in *Board of Trustees of the Policeman's Pension Fund of the City of Pueblo* v. *Koman*, (1956), 298 P. 2d 737, at 741, 133 Colo. 598:

> "The right to receive a pension is a very different right from the right to receive payment once the

> basic right to receive a pension itself has been determined. Once the right to receive a pension has been determined, then the receipt of the pension is a continuing one. The basic or primary right (to receive the pension) is not a continuing one and may be barred by laches or the statute of limitations."

See also *Dillon* v. *Board of Pension Commissioners of the City of Los Angeles*, (1941) 18 Cal. 2d 427, 116 P. 2d 37. As the Court of Appeals indicated (App. 3-4a; 319 F. 2d 745), the basic action involved is one to establish status as a beneficiary of the trust. Such an action, being in equity, should be subject to the defense of laches. The right to receive periodic payments once the basic right to a pension is established, is a very different right and should be subject to the statute of limitations, being an action at law. Applying such a rule to the instant case, respondent, if laches were not applicable, would receive pension payments from March, 1957 to date. This is computed by applying the District of Columbia statute of limitations of three years. (Title 12, Section 201, D. C. Code)

The adoption of such a rule would not be dependent upon the fact that this is a discretionary trust. It would be applicable to all types of pension trusts. An applicant could be deprived of his right to a pension only if laches were proven, but the integrity of the trust and the rights of existing beneficiaries would be protected by allowing recovery of prior pension payments only within the existing period of the statute of limitations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

May 28, 1962

Memorandum

This is an action to require the defendant Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 to pay a pension to the plaintiff.

Plaintiff is a former miner. He retired from or ceased work in the bituminous coal industry on June 26, 1953. His application for pension was filed with the Trustees on or after July 7, 1953. The defendants denied plaintiff's application for pension on the grounds that he was not eligible for a pension in that he had not completed 20 years service in the coal industry within the 30-year period immediately preceding his application for pension. Admitted in evidence are the Trustees' record and files, and the Court finds and concludes from that evidence and the other evidence presented at the trial that there is substantial evidence to sustain the decision of the Trustees.

Prior to January 29, 1953, the rules for eligibility promulgated by defendant Trustees under the terms of the Trust Agreement provided, among other things, that a miner was eligible for a pension if he had completed 20 years of service in the coal industry. There was no restriction as to the period of time in which those 20 years of service had to be completed. Plaintiff contends that the amendment of the eligibility rules in January, 1953, was illegal as to him because they retroactively increased the eligibility requirements at a time when he had already completed 20 years of service in the coal industry. The Court concludes that at the time of the amendment of the eligibility rules, plaintiff was not eligible for a pension in that he had not retired from or ceased work in the bituminous coal industry as required by the eligibility rules before amendment.

Plaintiff also contends that he had filed an application for pension in December, 1952, prior to the January, 1953, amendment of the rules of eligibility. The evidence shows that the most that plaintiff did was have an application for pension prepared with the assistance of the financial secretary of his local union, but that the same was never filed with the defendant Trustees. Until plaintiff had retired from or ceased work in the coal industry and had filed his application for pension with defendant Trustees, he was not eligible for a pension.

There is no evidence of arbitrary or capricious conduct on the part of defendants. Under all the circumstances, the Court concludes that plaintiff has failed to maintain his burden of proof in this case, and the Court finds for defendants upon the basis of the evidence considered at the trial.

The Court does not reach questions raised by the defendants relating to the statute of limitations and laches and it does not pass upon those matters of defense.

Judgment for defendants. This memorandum of decision shall serve as the findings of fact and conclusions of law under Rule 52 F.R. Civ. P. Counsel will present appropriate order.

s/ WILLIAM B. JONES
William B. Jones
United States District Judge

May 28, 1962

Filed

Order

This cause having come on to be heard before the Court without a jury, and the Court having heard and considered all of the evidence adduced in open Court by the Plaintiff and the Defendant Trustees, and the Court having heard

argument by counsel for all parties in open Court, and the Court having filed a Memorandum Decision constituting its findings of fact and conclusions of law, it is, by the Court, this 11th day of June, 1962,

ORDERED, That Plaintiff's Amended Complaint be and the same is hereby dismissed with prejudice.

s/ WILLIAM B. JONES
Judge

Opinion

(Cited as 319 F. 2d 744)

U. S COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,229

JOHN KOSTY, APPELLANT

v.

JOHN L. LEWIS, ET. AL., Trustees, United Mine Workers of America Welfare and Retirement Fund of 1950, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided May 23, 1963

Mr. Louis Rabil, with whom *Mr. Joseph M. Stone* was on the brief, for appellant.

Mr. Edward L. Carey, with whom *Messrs. Pal J. Mitch* and *Charles L. Widman* were on the brief, for appellees.

Before BAZELON, Chief Judge, and BURGER and MCGOWAN, Circuit Judges.

MCGOWAN, *Circuit Judge*: A problem arising in the administration of the United Mine Workers of America Welfare and Retirement Fund of 1950 is the subject of this appeal. It is prosecuted by a member of the union who

brought suit to compel the payment of a retirement pension which the Trustees of the Fund had denied him. After a trial to the District Court, his action was dismissed. An understanding of the issues to be resolved requires an examination of (1) the nature and origin of the Fund, including the provisions made for its administration, (2) the circumstances of the appellant in relation to his claim of eligibility for a pension, and (3) the function and scope of judicial review in a matter of this kind.

I

The creation of the Fund in the first instance was dependent upon the benevolent regard of Congress, as manifested by the following exempting provision in Section 302(c) of the Labor Management Relations Act of 1947,[1] which authorizes the establishment in the coal industry of welfare funds.

> "(c) . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer. . . ."

[1] 61 Stat. 157, as amended 73 Stat. 537, 29 U.S.C. § 186.

Pursuant to this statutory authorization, a subsequent collective bargaining agreement—the National Bituminous Coal Wage Agreement of 1950—brought the Fund into being, expressly denominating it to be "an irrevocable trust created pursuant to Section 302(c) of the 'Labor-Management Relations Act, 1947,'" to endure "as long as the purposes for its creation shall exist." The purposes specified include the payment of pension benefits on retirement of employees. The source of revenues for these purposes was the payment into the Fund by the Mine operators of 30¢ in respect of each ton of coal produced. Responsibility for operation of the Fund was placed in a Board of Trustees consisting of one representative of the United Mine Workers of America, one representative of the coal operators, and one neutral selected by the other two. The Trustees were directed to designate a portion of the revenues received for use in providing pensions, but a substantial measure of discretion, with respect to pension as well as other benefits, was lodged in the Trustees in these terms:

> "Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters."

At their second meeting on April 5, 1950, the Trustees adopted Resolution No. 10, providing a monthly pension for retired employees. Resolution No. 10 promulgated regulations (stated to be "subject to amendment, revocation and revision at the discretion of the Trustees") prescribing eligibility requirements and covering other administrative aspects of the pension system. In order to be eligible, an applicant for a pension was required to have (1) at

tained the age of 60, (2) retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946, (3) been employed for at least one year immediately preceding his retirement, and (4) completed 20 years of service in the Coal Industry.

In January 28, 1953, the Trustees adopted Resolution No. 30, which superseded Resolution No. 10 as the governing regulation with respect to pension eligibility requirements. The new resolution was made effective forthwith, that is to say, January 29, 1953. The significant change which it made, for purposes of this proceeding, was to prescribe that the requisite 20 years of service must have taken place within the 25-year period immediately preceding the filing of a pension application. A few weeks later, on March 13, 1953, the Trustees, by Resolution No. 31, amended Resolution No. 30, retroactively effective as of January 29, 1953, by enlarging from 25 to 30 years the period immediately preceding application within which the 20 years of service must have occurred. This change was perpetuated in a further amending resolution, No. 32, adopted by the Trustees on May 12, 1953.

II

The appellant, at the age of 65 years and five months, retired on June 26, 1953, and promptly thereafter filed his application for a pension on the form provided by the Fund. The application recited a total of over 31 years of service in the coal industry, comprised of two non-consecutive periods. The first of these was from 1906 to 1924 as an employee of Bethlehem Mines Corporation; the second was from 1940 to 1953 as an employee of Stineman Coal & Coke Company.

The administrative files of the Fund relating to this application, which were put in evidence in the District Court, showed that appellant's application was denied for the reason that it did not appear that appellant had had 20

years of service in the 30-year period immediately preceding the filing of the application, as required by Resolution No. 39, as amended. The record suggests that efforts were made over a long period of time, both by the appellant and by others on his behalf, to persuade the Trustees to alter their decision, but these efforts were unavailing and the suit in the District Court was instituted.

The appellant's second period of employment—from 1941 to 1953—was conceded by the Trustees, but, in response to interrogatories, the Trustees stated that they had no information as to whether appellant had or had not been employed as a coal miner from 1906 to 1924. At the trial appellant testified at length with respect to this first period of employment, stating that it had ended because he had received an injury in the course of his employment. This testimony was corroborated by that of another miner who had worked with appellant at the same mine throughout the entire period from 1906 to 1924. The Trustees offered no evidence of any kind contradicting this testimony, and made no effort to impeach the witnesses on this point.

The trial judge found that Resolution No. 10 imposed "no restriction as to the period of time in which those 20 years of service had to be completed." This finding seems fully justified by the language of Resolution No. 10, and the Trustees make no contrary contention. Since appellant was over the age of 60 at the time Resolution No. 10 was adopted, he could have qualified for a pension thereunder at any time by a simple election to stop working. He was not bound to do so, however, because Resolution No. 10 did not impose any requirement that an employee, otherwise qualified for a pension thereunder, was obligated to terminate his employment and take his pension.

The record shows explicitly, from the testimony of the neutral Trustee, that no notice of any kind was given by the Trustees of their purpose to change the eligibility re-

quirements. As has been noted, the amending resolution was effective immediately upon its adoption. Thus, appellant, at the age of 65, found his existing eligibility abruptly terminated, and he was confronted with the necessity of amassing approximately 8½ years additional service in order to qualify under the new rule.[2] The trial judge concluded that, under these circumstances, there was no evidence of arbitrary or capricious conduct on the part of the Trustees, *vis-a-vis* the appellant, and that his claim for relief had not been established.

III

The trial judge correctly concluded that the issue presented to him was whether the Trustees' action was arbitrary or capricious in relation to the appellant in the light of the facts adduced. This conclusion is fully in accord with the definition of the scope of judicial review articulated by this Court in *Danti* v. *Lewis*, —— U.S.App.D.C. ——, 312 F.2d 345 (1962). Both in that case and in this the Trustees have accepted the appropriateness of this definition, and, accordingly, we need not consider any contention that there is no power whatsoever in a court to interfere in any way with the Trustees in their administration of the Fund. It could not be otherwise. The institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form;[3] and the Trustees, like all fiduciaries, are subject to judicial correction in a proper

[2] The application filed by appellant stated "illness" as a reason for retiring. This fact, when considered in conjunction with appellant's advanced age, underscores the magnitude of the adverse effect upon appellant wrought by the change in the years-of-service requirement.

[3] See *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459 (1960). The statutory authority for the Fund is given in trust terms, and the parties to the instruments creating it adhered rigorously to this terminology. Appellant's suit, therefore, is one to establish his status and rights as a beneficiary.

case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run.

IV

The question before us, then, is: Was the court below right in determining, on the facts of record, that the abrupt alteration by the Trustees of the eligibility requirements was not an arbitrary or capricious action in its impact upon appellant?

Counsel for appellant have pressed two principal contentions upon us as warranting reversal of the decision of the District Court. One is couched in terms of "vested rights," and consists of the claim that appellant, prior to the adoption of the revised eligibility requirements, had possessed in substance fully matured rights entitling him to a pension, and that these rights could not lawfully be divested. Essential to this argument is the assertion that that element of eligibility in Resolution No. 10 involving actual retirement from work is not to be placed in the same scale with the other requirements, such as length of service and age—that it should be regarded as a "procedural rule" rather than one of a substantive character, and thereby be waived or disregarded in appraising the degree to which pension rights have become vested in one who meets all of the other standards laid down as essential to eligibility.

In the view we take of the case, however, we find it neither necessary nor illuminating to approach the problem by reference to these well-worn legal slogans.[4] We recognize that the Trustees have been accorded wide latitude in specifying from time to time *what* the eligibility qualifications shall be. Our concern is, rather, with *how*

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[4] *Danti* v. *Lewis*, *supra*; *compare Ruth* v. *Lewis*, 166 F. Supp. 346 (D.D.C. 1958), *with Hobbs* v. *Lewis*, 159 F. Supp. 282 (D.D.C. 1958); *cf. Kennet* v. *United Mine Workers of America*, 183 F. Supp. 315, 317-18 (D.D.C. 1960).

changes in the qualifications are made. Stated another way, our interest here is directed to the reasonableness of the opportunity afforded to mature pension eligibility under current standards where all that is lacking is the actual termination of employment rather than in debating whether such eligibility should be regarded in substance as already having been matured.

This brings us to appellant's second major contention, which is that the Trustees acted arbitrarily in altering the eligibility requirement in respect of years of service without prior notice of any kind or the provision of an opportunity rationally calculated to give appellant an opportunity to elect between taking his pension or continuing in employment subject to the new requirement. It is clear from the nature of the testimony given by the neutral Trustee at the trial that the Trustees felt themselves under no obligation of any kind in this regard. This testimony was simply that no notice of any kind was afforded, which is another way of saying that the Trustees looked upon employees situated as was appellant as continuing to work in the coal industry at their peril in terms of the possibility that pension eligibility might be wiped out for all practical purposes at any moment by the sudden action of the Trustees in changing the requirements. We do not believe that the concededly broad grant of authority to the Trustees was this broad.[5] To hold otherwise would

[5] In the *Danti* case, *supra*, the employee had retired and filed his application prior to the adoption of Resolutions Nos. 30 and 31, but it was not considered until Resolution No. 30 was in effect. Although possessing 20 years of service in all, these years did not fall entirely within the 30-year period immediately preceding retirement. This Court held that it was arbitrary for the Trustees to reject the application for failure to meet the changed standard. There, however, the Trustees on reconsideration again rejected the application on the ground that the employee had failed to qualify under another requirement of Resolution No. 10, and the resolution of that issue was necessarily involved in the decision of that case. No such claim is made by the Trustees here.

make this particular grant wholly out of harmony with the other features of the trust agreement, which reflect the fiduciary character of the responsibilities devolved upon the Trustees in respect of employees who had devoted substantial segments of their lives to the coal industry.

We do not deny the authority of the Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry. But trial and error, where trust relationships are involved, operate within some limitations of fundamental fairness. These were, in our judgment, exceeded here by the failure of the Trustees to accord any notice or period of grace which would have afforded some reasonable possibility for an employee like appellant to have elected to retire and take the pension available immediately prior to the change.[6] We do not say that actual notice to each employee of his opportunity so to elect would be necessary to defeat a claim, since there may be problems of identification and communication which the Trustees may not be able to overcome in every case, although no point of this kind is made on their behalf in the record of this case. We do say that it was clearly not beyond the capacity or resources of the Trustees to have devised some system of publicity for the impending change which reasonable men would regard as having fulfilled their fiduciary undertakings. To have made no effort at all in such direction entitled this appellant to claim with reason that he has been exposed to arbitrary and capri-

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[6] *Compare International Union of Electrical, Radio and Machine Workers* v. *NLRB*, 113 U.S. App. D.C. 342, 307 F. 2d 679, *cert. denied* 371 U.S. 936 (1962). There, this Court, in a different, but not wholly unrelated context, remarked upon "the obligation of fair dealing which includes the duty to inform the employee of his rights and obligations so that the employees may take all necessary steps to protect his job."

cious action by those who owed him adherence to a different—and higher—standard of conduct.

V.

Since the District Court dismissed appellant's claim because it found no arbitrary and capricious action on the part of the Trustees, the decision below is reversed. Because of the completeness of the present record and considering the nature of the case, further proceedings at the trial level are not justified. 28 U.S.C. § 2106 grants this Court broad discretion in the disposition of a case on appeal:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Where the evidence of record points in only one direction, as here, justice does not require this Court to remand a case for the record to be reopened.[7]

Since we have found that the changed eligibility requirements cannot apply to this appellant because the Trustees acted in an arbitrary and capricious manner, appellant's pension eligibility is governed by Resolution No. 49. Appellant's employment from 1941 to 1953 was conceded; and the evidence of appellant's employment from 1906 through 1924 was not only uncontradicted but the Trustees expressly admitted that they had no evidence to rebut it. Reopening the proceedings thus would serve no useful pur-

[7] See *Tinder v. United States*, 345 U.S. 565 (1953), and *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

pose. Appellant met the requirements of Resolution No. 19, and he is entitled to his pension from the date of his retirement.

There remain to be considered two affirmative defenses which the trial judge did not reach, namely that the statute of limitations and laches bar the present action. Ordinarily, resolution of these issues should be made by the trial judge in the first instance. However, the record itself completely negates both defenses. Indeed, the defense of laches was not directed to the issues which we find to be controlling. Rather, it was urged as a bar to two alternative theories of recovery advanced by appellant at the trial, *i.e.*, that he had actually fulfilled the requirement of twenty years of service in the coal industry within thirty years preceding retirement; and that he had filed an application for pension in December of 1952, prior to the effective date of the new regulations, which application could not be found. We agree with the skepticism shown by the trial judge during oral argument as to the merits of this defense.[8] Since, however, laches goes only to two matters which are not determinative in our view of the case, we need give the defense no further consideration.

Turning to the defense that the statute of limitations barred the present action, this Court has previously held that equity does not necessarily follow the statutory period of limitations.[9] We will assume, however, that defendants were correct in their assertion that the applicable limi

[8] See Transcript of Proceedings, pages 59[illegible]-94. For laches to be a valid defense, the defendant must show an undue and unexcused delay which caused prejudice to the preparation of the defense. *See Southern Pacific Co.* v. *Bogert*, 250 U.S. 483 (1919); *Major* v. *Shaver*, 88 U.S. App. D.C. 148, 187 F. 2d 211 (1951); *United States* v. *Moreau*, 87 U.S. App. D.C. 84, 182 F. 2d 986 (1950).

[9] Haliday v. Haliday, 56 App. D.C. 179, 11 F. 2d 565 (1926); *cf. Naselli* v. *Millholland*, 89 F. Supp. 943 (1950), *aff'd* 88 U.S. App. D.C. 237, 188 F. 2d 1005 (1951).

would be three years from the date a cause of action "accrued."[10] The Trustees urged that appellant's cause of action accrued in September of 1953, when his application was first turned down. This argument we cannot accept. Appellant was a beneficiary of an express trust. Numerous courts have held that in order to start the statute of limitations running against an express trust, there must be a clear and continuing repudiation of the right to trust benefits.[11] The administrative file, which was introduced into evidence by the Trustees themselves, is replete with documentary evidence showing that the case was still not closed in 1960, when this action was commenced. At least three different investigations were made by the Trustees into the merits of appellant's claim for a pension. One was conducted in 1957, and a final one when this action was begun. Until a defense was interposed in this case, we cannot say that appellant's claim was completely repudiated. Until that time, the Trustees were giving continuing consideration to appellant's eligibility. On these undisputed facts, this action is not barred by the statute of limitations.

The case is remanded to the District Court with directions to enter judgment for the appellant in accordance with this opinion.

[10] D.C. Code § 12-201: "... and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain any such action shall have accrued."

[11] See, *e.g.*, *Haliday v. Haliday*, *supra*; *Frazary v. Fitzpatrick*, 21 Cal. 2d 851, 136 P. 2d 566 (1943); *Hill v. Irons*, 92 Ohio App. 141, 109 N.E. 2d 699 (1952), *rev'd on other grounds*, 160 Ohio St. 21, 113 N.E. 2d 243 (1953); *Howell v. Wilson*, 323 S.W. 2d 61 (Tex. Civ. App. 1959).

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

Effective March 5, 1950, to June 30, 1952

Executed at Washington, D. C., March 5, 1950

* * * * * * * * * *

United Mine Workers of America Welfare and Retirement Fund of 1950

A. It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the "United Mine Workers of America Welfare and Retirement Fund of 1950." During the life of this Agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30¢) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America, and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve, of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado is appointed as the neutral Trustee. Said three Trustees so

named and designated shall constitute the Board of Trustees to administer the Fund herein created.

In the event of a deadlock on the designation or agreement as to any future neutral Trustee; an impartial umpire shall be selected either by agreement of the two Trustees; representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the District of Columbia for the appointment of such an impartial umpire, all as made and provided in Section 302 (c) of the "Labor-Management Relations Act, 1947."

It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the "Labor-Management Relations Act, 1947," and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or State law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the "Labor-Management Relations Act, 1947," as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Work-

ers of America and their families and dependents, and to employees of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid "Labor-Management Relations Act, 1947." Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the "Labor-Management Relations Act, 1947," and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

It is further agreed that the detailed basis upon which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon.

Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall

be void. The moneys to be paid into said fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement.

The obligation to make payments to the "United Mine Workers of America Welfare and Retirement Fund of 1950" under this contract shall become effective on March 6, 1950, and the first actual payments are to be made on April 10, 1950, and thereafter continuously on the 10th day of each succeeding calendar month covering the production of all coal for use or sale during the preceding month.

It is stipulated and agreed by the contracting parties hereto that the Trustee designated by the United Mine Workers of America shall be the Chairman of the Trustees of the Fund provided for in this Agreement.

It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly statement showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto. Payments to said Fund shall be made by check payable to "United Mine Workers of America Welfare and Retirement Fund of 1950" and shall be delivered or mailed to the office of said Fund located at 907 Fifteenth Street, N. W., Washington, D. C., or as otherwise designated by the Trustees.

SECOND MEETING OF THE TRUSTEES, UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, APRIL 5, 1950

Resolution No. 10

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement") other than those exempted from the 1950 Agreement; and

WHEREAS, the Trustees desire to authorize the continuation of pension payments of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have been approved by the Trustees of the 1947 Fund, and to adopt regulations to govern the payment of pensions hereafter;

NOW THEREFORE BE IT RESOLVED, that the Director be and is hereby authorized to continue payment of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have heretofore been approved by the Trustees of the 1947 Fund in full force and effect, subject to Paragraphs III and IV of the regulations hereinafter provided, the first payment being for the month of June, 1950 or as soon thereafter as practicable, and shall be subject to amendment, revocation and revision at the discretion of the Trustees;

BE IT FURTHER RESOLVED, that the following regulations shall govern the payment of pensions of ONE HUNDRED DOLLARS ($100.00) per month to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject

amendment, revocation and revision at the discretion of the Trustees.

1. ELIGIBILITY

An applicant shall be eligible for a pension if he meets the following requirements:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Retired by permanently ceasing work in the Bituminous Coal Industry after May 28, 1946.

C. Been employed for a period of at least one year in the Bituminous Coal Industry immediately preceding his retirement.

D. Completed twenty (20) years service in the Coal Industry in the United States, its possessions or territories, or the Dominion of Canada; a year of service being one in which applicant has for more than six months in any calendar year:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

Any applicant who meets all requirements of eligibility at any time after May 28, 1946, shall not be subsequently disqualified by returning to work in the Coal Industry for a period of less than one year.

II. Proof of Eligibility

A. Age

1. Wherever possible the age of applicant will be verified by the Social Security Administration records.

2. Applicant shall be required to submit documentary evidence of probative value to establish his age in cases where the Social Security Administration records do not verify his age as stated on the application for pension.

B. Service

1. The following statements shall be deemed satisfactory proof of service for the period or periods covered by such statements:

a. Certification by a Local Union or by Local Unions, or by Districts of the United Mine Workers of America that an applicant served in the Coal Industry.

b. Statements by persons who have personal knowledge of applicant's service in the Coal Industry.

c. Certified copy or photostatic copy of discharge from a branch of the Defense Department of the United States or statements from the appropriate branch of the Defense Department.

C. The burden of proving eligibility shall be on the applicant.

I. PAYMENTS

A. General

Payments to pensioners shall be as follows:

1. First payment shall be for the first month after authorization of pension.

2. Last payment shall be for the month in which pensioner dies.

3. Payments shall be payable on the first day of each month at pensioner's last address of record.

B. Suspension

No payment shall be made for any month in which pensioner:

1. Does not reside within the continental limits of United States, its territories or possessions, or the Dominion of Canada.

2. Performs compensated services for an employer in the Coal Industry.

3. Fails to continue to meet requirements of eligibility.

V. FALSE STATEMENTS

Any Applicant for a pension who knowingly and willfully falsifies any records or makes any false misrepresentations or statements or withholds any information in order to secure a pension or to continue to receive a pension from the Fund shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such misrepresentations or omissions the individual involved will be required to reimburse the Fund in the amounts he received from the Fund.

BE IT FURTHER RESOLVED, That the Director is hereby authorized and directed to activate this Resolution in accordance with its terms and conditions and is empowered to do all things, to perform all necessary acts, and to require the submission of evidence in order to effectuate the purposes of this Resolution.

TWENTY FIRST MEETING OF THE BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, JANUARY 29, 1953

Resolution No. 30

PENSION

WHEREAS, the United Mine Workers of America Welfare and Retirement Fund of 1950 has for one of its purposes the payment of pensions to individual members of the United Mine Workers of America, and to employees of the coal operators signatory to the National Bituminous Coal Wage Agreement of 1950 (hereinafter referred to as the "1950 Agreement"), other than those exempted from the 1950 Agreement; and

WHEREAS, the Trustees desire to authorize the continuation of pension payments of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have heretofore been approved by the Trustees of this Fund, or by Trustees of the 1947 Fund, and to adopt regulations to govern the payment of pensions hereafter;

NOW THEREFORE BE IT RESOLVED, that the Director be and is hereby authorized to continue payment of ONE HUNDRED DOLLARS ($100.00) per month to pensioners whose applications have heretofore been approved by the Trustees of this Fund, or by the Trustees of the 1947 Fund, in full force and effect, subject to Paragraphs III and IV of the regulations hereinafter provided, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

BE IT FURTHER RESOLVED, that effective January 29, 1953, the following regulations shall govern the payment of pensions of United Mine Workers of America, and to employees of the coal operators signatory to the 1950 Agreement other than those exempted from said Agreement, and shall be subject to amendment, revocation and revision at the discretion of the Trustees.

I. ELIGIBILITY

An applicant shall be eligible for a pension if he has:

A. Attained the age of sixty (60) years or over at the time of his application for pension.

B. Completed twenty (20) years service in the coal industry in the United States, its possessions or territories, or the Dominion of Canada within the twenty-five (25) year period immediately preceding his application for pension; a year of service being one for which the applicant has:

1. Worked in a job classified in any National Coal Wage Agreement for an employer in the Coal Industry.

2. Rendered service as an employee of the United Mine Workers of America in the Coal Industry and is not eligible for a pension under the United Mine Workers of America pension or retirement plan.

3. Served in the military service of the United States in any war or national emergency.

C. Retired from or ceased work in the Bituminous Coal Industry after May 28, 1946, following a period of regular employment in the Coal Industry immediately preceding May 29, 1946; provided that if he had retired from or ceased working in the Bituminous Coal Industry prior to May 29, 1946, he shall be eligible for a pension

only upon the completion of twenty (20) years service in the Bituminous Coal Industry, and meets the other requirement of eligibility as contained in Paragraphs A and B and its subsections, subsequnt to May 28, 1946.

II. Proof of Eligibility

A. Age

1. Wherever possible the age applicant will be verified by the Social Security Administration records.

2. Applicant shall be required to submit documentary evidence of probative value to establish his age in cases where the Social Security Administration records do not verify his age as stated on the application for pension.

B. Service

1. The following shall be deemed satisfactory proof of service for the period or periods covered therein:

a. Certification by a Local Union or by Local Unions, or by Districts of the United Mine Workers of America that an applicant served in the Coal Industry.

b. Statements by persons who have personal knowledge of applicant's service in the Coal Industry.

c. Certified copy of a photostatic copy of discharge from a branch of the Defense Department of the United States or statements from the appropriate branch of the Defense Department.

d. Any other proofs requested by, or satisfactory to, the Fund.

C. The burden of proving eligibility shall be on the applicant, and the proof submitted shall be acceptable to the Fund.

III. Payments

A. General

Payments to pensioners shall be as follows:

1. First payment shall be for the first month after authorization of pension.

2. Last payment shall be for the month in which pensioner dies.

3. Payments shall be payable on the first day of each month at pensioner's last address of record.

B. Suspension.

No payment shall be made for any month in which pensioner:

1. Does not reside within the continental limits of the United States, its territories or possessions, or the Dominion of Canada.

2. Performs compensated services for an employer in the coal industry or receives income, revenue, emolument, proceeds, gift or return from the Coal Industry either directly or indirectly.

3. Fails to continue to meet requirements of eligibility.

IV. False Statements

Any person who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure a pension for himself or for any other person or to continue to receive a pension from the Fund

for himself or for any other person shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such misrepresentations or omissions the individual involved will be required to reimburse the Fund in the amount he received from the Fund.

BE IT FURTHER RESOLVED, that the Director is hereby authorized and directed to activate this Resolution in accordance with its terms and conditions and is empowered to do all things, to perform all necessary acts, and to require the submission of evidence in order to effectuate the purposes of this Resolution.

TWENTY-SECOND MEETING OF THE BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE & RETIREMENT FUND OF 1950, MARCH 13, 1953

Resolution No. 31

PENSION

BE IT RESOLVED, That the words and figures "twenty-five (25)" appearing in the fourth line of Paragraph 1 B of Resolution No. 30 be stricken and in lieu thereof the words the figures "thirty (30)" be inserted, to be effective as of January 29, 1953.

BE IT FURTHER RESOLVED, That Resolution No. 30 in all other respects remains unchanged and is in full force and effect.

Twenty-Third Meeting of the Board of Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, May 12, 1953.

Excerpt from the "Douglas Committee Report"

(A). PENSIONS

The fund pays pensions of $100 a month to retired miners. The present major eligibility provisions are that the applicant must (1) be 60 years of age or over at the time of filing his application; (2) have completed 20 years of service in a classified job, i.e., a job subject to the collective bargaining agreement in the coal industry, during the 30 years immediately preceding his date of application; (3) have retired after May 29, 1946, the date the first fund was established, following regular employment in a classified job in the mine of an operator signatory to the agreement, and (4) have been regularly employed in a classified job in the coal industry immediately prior to the date the first fund was established. As of June 30, 1955, these pension payments were being received by 59,482 retired miners. Pensioners and their dependents are also eligible for hospital and medical care benefits.

An applicant may file for a pension either through his local union or directly at the Washington office of the fund. The information required of an applicant is extensive. The record of employment in the mines prior to 1937 must be validated by certificates of miners who worked with the applicant during the time shown or by affidavits of employers.

The application blank contains a space for certification by officials of the local union that the applicant is a member of the local and also a space for certification by an authorized representative of the U. M. W. district that the applicant is a member in good standing of the union. However, applications may be filed directly with the fund by miners not members of the union, and fund personnel state that applications are acted upon without reference to current union status.

In the past, various cases have come before the National Labor Relations Board against the United Mine Workers,

charging that the welfare and retirement plan was being administered solely for the benefit of UMW members in good standing, in violation of sections 8 (b)(1) and 8 (b)(2) of the Labor-Management Relations Act of 1947. Substantially all of these charges have been disposed of at the NLRB regional office level, either by dismissal, withdrawal, or settlement. Only one resulted in an unfair labor practice complaint proceedings. This case was thereafter closed upon voluntary compliance by the union. In this case, it was agreed that the contract executed March 5, 1950, provided for the consideration of applications for fund benefits regardless of whether or not the applicant was a union member.

Applications for pensions and for all other benefits are processed at the Washington office. If necessary, extensive investigations, including field visits, are made to determine whether or not the applicant meets the eligibility conditions set up by the board of trustees.

Applications which present close questions of eligibility, or for which required evidence has been unobtainable through correspondence, are taken up with the assistant to the director by the supervisor of the examining unit for joint review. If further consideration of the applicant's eligibility status is required, the assistant to the director then presents the application and entire file to a special review committee. The assistant to the director and an assistant comptroller serve on each of these special review committees, and one or more supervisors and senior examiners from the examining units, other than those previously examining the application, are assigned for service on these committees. If the special review committee, after full review of the application, reaches a unanimous decision as to the eligibility status of the applicant, action on it is taken accordingly.

During the fiscal year ending June 30, 1955, 7,061 applications for pensions were received. In the same year

there were 6,778 authorizations of pensions and 1,182 denials. Denials amounted to 16.7 percent of the number of applications received. The chief reasons for denial of pensions in this fiscal year were (1) the applicant furnished no proof of 20 years of classified service out of the last 30 years (406 cases); (2) there was no proof of classified employment immediately prior to May 1946 (384 cases); (3) the requested evidence was not submitted; (4) the applicant furnished no proof of age; and (5) the applicant was presently employed in the coal industry.

The subcommittee staff members reviewed illustrative cases of pension applications which had been approved or denied and a small random sample of cases approved for pensions. They were impressed with the businesslike way in which these applications were handled and by the care taken to see that applications were acted upon in accordance with fund eligibility requirements.

The subcommittee either directly or through referral from Senators had received over the past year some dozen letters from miners who were aggrieved because their applications for pensions had been denied. These cases were reviewed in detail with fund personnel. In every instance the denial of a pension was found to be in accordance with the eligibility requirements.

The eligibility conditions for pensions have been changed a number of times. An important change was made in 1953. Prior to this time, the essential eligibility conditions were that (1) the miner must be 60 years of age or older; (2) have retired after May 29, 1946; (3) have been employed in the industry in a classified job for a year preceding retirement, and (4) have had 20 years of service in classified jobs in the industry. In 1953 these conditions were changed to require that the 20 years of service must have been within the 30 years preceding retirement, and that the applicant must have been regularly employed in a classified job immediately prior to May 29, 1946.

These changes have caused a considerable number of persons to be denied pensions who would otherwise have been eligible under the former requirements. (As indicated above approximately a third of all denials in the 1955 fiscal year were on the ground that the applicant had not been employed in the industry immediately prior to inception of the fund.) The main reasons for these changes were that the fund was finding that many individuals who had retired or had left the industry prior to May 29, 1946, were obtaining temporary employment as miners only to qualify for pensions, and the mounting costs of the pension program required some tightening up of eligibility conditions.

Once a pension has been authorized, the pensioner continues to receive it each month until death, or until he resumes employment in the coal industry; its continuance is not affected by subsequent changes in eligibility conditions, and fund personnel state it is in no way contingent upon the pensioner retaining his membership in the United Mine Workers. However, pensioners as a group have no equity in the fund and their pensions could be reduced or eliminated if the financial condition of the fund necessitated.

The pension program is on a pay-as-you-go basis; there is no funding of benefits. The trustees representing the coal operators have on a number of occasions in the past voiced the opinion that the benefits should be funded, but Lewis and Miss Roche have thought otherwise.

Expenditures for pension benefits have increased steadily in the past 5 fiscal years, as shown in table 9, going from $42,473,000 in 1951 to $69,896,155 in 1955. Inasmuch as the program is relatively young, it may be expected that pension costs will continue to increase for a number of years before leveling off.

The total administrative costs allocable to the pension program are calculated by the subcommittee staff to be approximately 1.7 percent of total pension benefits paid.

29 USC, Section 186

Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5)

with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing

pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

* * *

"(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provision of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-110 and 113-115 of this title."

* * *

DISTRICT OF COLUMBIA CODE, TITLE 12 SECTION 301 [24:341]

Periods—Recovery of real property—Executor's or administrator's bond—Instruments under seal—Simple contract—Property damage—Statutory penalty or forfeiture—Certain torts—Actions not specified—Persons under disabilities.

No action shall be brought for the recovery of lands, tenements, or hereditaments after fifteen years from the time the right to maintain such action shall have accrued; nor on any executor's or administrator's bond after five years from the time of the right of action accrued thereon; nor on any other bond, or single bill, covenant, or other instrument under seal after twelve years after the accruing of the cause of action thereon; nor upon any simple contract, express or implied, or for the recovery of damages for any injury to real or personal property, or for the recovery of personal property or damages for its unlawful detention after three years from the time when the right to maintain any such action shall have accrued; nor for any statutory penalty or forfeiture, or for libel, slander, assault, battery, mayhem, wounding, malicious prosecution,

false arrest, or false imprisonment after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued: *Provided*, That if any person entitled to maintain any of the actions aforesaid shall be at the time of the accruing of such right of action under twenty-one years of age, non compos mentis, or imprisoned, such person or his proper representative shall be at liberty to bring such action within the respective times in this section limited after the removal of such disability, except that where any person entitled to maintain an action for the recovery of lands, tenements, or hereditaments, or upon any instrument under seal, shall be at the time such right of action shall accrue under any of the disabilities aforesaid, such person or his proper representative, except where otherwise provided herein, may bring such action within five years after the removal of such disability, and not thereafter. (Mar. 3, 1901, 31 Stat. 1389, ch. 854, § 1265; June 30, 1902, 32 Stat. 542, ch. 1329.)

[Filed July 9, 1963]

Before: Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright and McGowan, Circuit Judges, in Chambers.

Order

On consideration of appellees' petition for rehearing en banc, and of appellant's answer thereto, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

Dated: July 9, 1963

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NO. 523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JOHN L. LEWIS, JOSEPHINE ROCHE AND HENRY G. SCHMIDT, TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Petitioners*,

v.

JOHN KOSTY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia is reported at 319 F. 2nd 744. The Court of Appeals denied the Petition for Rehearing by an Order *per curiam* without Opinion (App. 35a).* The opinion of the United States District Court for the District of Columbia is unreported and is printed in the Appendix to the Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 23, 1963, and the Petition for Rehearing *En Banc* or

* The abbreviation "App." refers to the Appendix to the Petition for a Writ of Certiorari.

by the Division was denied on July 9, 1963. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Respondent, who had worked some thirty years in coal mines (namely, 1906-1924 and from 1941-1953), and who had worked beyond the designated retirement age in an applicable pension plan, was entitled upon his cessation of work to the pension he would have otherwise received (had he ceased work six month or a year or two or even three years earlier), even though the Board of Trustees had, approximately three months prior to his cessation of work, without notice to the Respondent or any other beneficiary, modified retroactively the years-of-service requirement in such a manner that the Respondent was, and would be, unable to meet the newly-adopted requirement?

STATUTES INVOLVED

In Respondent's opinion, no question is presented in this case which involves the interpretation or application of any Federal statutory provision.

STATEMENT

In view of the Statement set forth in the Petition, as well as the recital of the pertinent facts set forth in the Court of Appeals opinion at App. 4a-8a, no useful purpose would be served by including a similar statement herein.

ARGUMENT

1. The ruling of the Court of Appeals (that in failing to give notice of a change in eligibility requirements the Petitioners arbitrarily and capriciously nullified the Respond-

ent's pension rights)[1] essentially involved only the application of traditional equitable concepts concerning the administration of trust funds.[2]

With respect to the basic question of the obligation owed the Respondent, the Petition fails to establish, or even indicate, how the decision below is not in accord with decisions of this Court or is in conflict with decisions of other circuit courts of appeal or, in what manner there is presented a substantial Federal question or, indeed, any Federal question, and in the absence of such a showing we submit that review is unwarranted. What the Petitioners simply seek is further appellate review which is inconsistent with the true mission of the Supreme Court: to clarify, expound and develop the law in its most significant national aspects.

2. Plainly, none of the issues decided below involve a substantial Federal question or any Federal question at all. The Petitioners attempt to assert that there is a Federal question involved in this case by referring to Section 302(c)(5) of the Labor-Management Act, 1947, and imply-

[1] From the procedural viewpoint, also involved were issues concerning laches, the applicability of a statute of limitations to an equitable action and the discretion afforded the Court of Appeals, under 28 USC 2107, not to remand the case but to direct the entry of an appropriate judgment, as may be just under the circumstances.

[2] The Court of Appeals properly held that by failing to notify the Respondent of the pending revision of the twenty-year service requirement so as to afford him an opportunity to resign, the Trustees acted in such an arbitrary and capricious manner that, in equity and justice, the revised service requirement was declared inapplicable to Respondent. Otherwise, we reach the absurd situation that an employee's continuance at work beyond the time he is entitled to retire and receive a pension results in the loss of a pension that he would unquestionably have received had he worked less. The Court of Appeals decision avoids this situation, at least to the extent that an employee who has met the age and years-of-service requirements is given an opportunity to retire during a grace period.

ing that this is a case of first impression involving the scope of permissible authority to be exercised by Trustees under Section 302(c) of that Act. Significantly, that section has not been argued, or even mentioned, in this case up to the point of the submission of this Petition and, indeed, there is no question presented under that section. Section 302(a) makes it unlawful for any employer to pay money to any representative of his employees and Section 302(c)(5) simply renders the provisions of Section 302(a) inapplicable with respect to money paid to a trust fund established by such representative for the exclusive benefit of the employees of such employer. There is nothing in Section 302(c)(5) relative to the powers bestowed upon, or to be exercised by, Trustees of a welfare fund created pursuant to that section.

That there is no issue here concerning the violation of a provision of Sections 302(a) or (c) is recognized even by the Petitioners who point out "it is important to distinguish the case now presented from a case where Trustees are claimed to have acted contrary . . . to the Labor-Management Relations Act, 1947. No such issues are involved here." (Petition, p. 10). There is nothing in the Petition, other than the mere reference to Section 302(c), which indicates that a conflict between the Courts of Appeals exist or that a Federal, let alone a substantial Federal, question, is involved. We submit that the reference made to Section 302(c) is simply designed to afford an appearance of a Federal question for purposes of this Petition but that, in reality, only procedural questions and the application of traditional equitable principles—matters with which this Court should not be burdened—are here involved.

3. The Court of Appeals properly did not remand the case to the District Court for a retrial of issues which are either irrelevant or which, on the basis of the record, could

not possibly be resolved in any different manner. All of the contentions made or suggested in the Petition herein with respect to the need for further evidence to demonstrate the basis of the change in eligibility requirements or to establish Respondent's twenty years of service were specifically advanced by the Petitioners in their Petition to the Court of Appeals for a Rehearing *En Banc* and unanimously rejected by the full court.

a. There has never been a question presented in this case as to whether the Petitioners were vested with the discretion to promulgate and modify eligibility requirements. Concededly such discretion must be exercised equitably so as not to destroy beneficiaries' rights. It is thus not relevant for the Petitioners to present evidence now to demonstrate the basis of the change in eligibility requirements since the authority to make such change has not been questioned. Rather, the question was raised as to the manner in which such change was accomplished; in this respect, evidence to demonstrate the basis of the change is neither necessary nor helpful.

If the "facts" underlying the Petitioners' change of eligibility requirements are now deemed so vitally necessary to establish the propriety of such change, why did Petitioners neglect or refuse to introduce such evidence at the trial? All of the information concerning the foundation for the Trustees' action, namely, the circumstances, motivation, experiences, and the Trustees' expertise was available at the time of the trial and could have been introduced. Petitioners apparently now desire a retrial on a new theory since their no-notice-was-necessary position has been rejected.[3]

[3] Contrary to Petitioners' assertion, the Court of Appeals did not consider *sua sponte* notice to beneficiaries as a condition precedent to the modification of the eligibility requirements. Petitioners have

Moreover, Petitioners' argument about the necessity for protecting the trust res and the alleged financial impact which a change with notice would have entailed was argued at length in the Petition for Rehearing before the Court of Appeals and not only is unsound but irrelevant. All of Petitioners' references to "pension mills" or "synthetic coal mines" or an estimated yearly cost of 100 million dollars are made without regard to the record in this case. In this connection, it is interesting to note that Petitioners refer at length to the so-called "Douglas Report" which is not a part of the record in this case. The irony of Petitioners'

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chosen, through most of this case, to ignore the question of notice which was raised by the Respondent both in the pre-trial statement, in the evidence presented, and in closing argument. Moreover, the Respondent argued "Notice" at length in its Court of Appeals brief and thus the Petitioners had ample opportunity to demonstrate the basis of the change in eligibility requirements if they thought that such evidence was significant in justifying the taking of action without notice.

The Petitioners assert on page 10 that the Petition does not reach the issue of notice to applicants who have previously qualified. Apparently, an applicant who has previously qualified but who has not yet retired may nevertheless be entitled to a pension even though his actual cessation of work occurs after a change in eligibility requirements. Thus, the fine line is drawn that if an employee files an application but continues to work he is entitled to a pension but if an employee has not filed an application he is not, even though his entitlement is no less than that of the employee who has filed an application.

With respect to the miners who were allegedly returning to the industry just for the sake of getting a pension, we simply note in passing that these miners are in no different position from the thousands of miners who made application and received pension benefits during the first year or two after the Fund came into existence. That there may be some who during a "notice" period would file an application for a pension (having returned to the industry just for that purpose) constitutes no fair reason, we submit, to cut off arbitrarily the rights of eligibles such as Respondent, if, indeed, the Petitioners had so arranged eligibility requirements as to permit persons who returned to the industry to qualify.

reliance on this report, at this time, is overwhelming. This report, which was Respondent's Exhibit No. 9 for identification, was denied admission because of the vigorous objection made by Petitioners. Thus, it is difficult to reconcile the contention now made that the case should have been remanded so that the District Court could have a full opportunity to inquire as to the reasonableness of the change. If such were ever in issue, and we deny that it was, the opportunity for its examination by the District Court was thwarted by Petitioners' own action and they should not now be heard to complain that this aspect of the case was not satisfactorily developed.

It is equally interesting to note that the contention that a failure to change the regulations would have entailed an estimated yearly cost of at least one hundred million dollars (Petitioners' Brief, p. 17)—a contention not heretofore made—represents a modification of the contention made in the Petition for Rehearing *En Banc* that the decision of the Court of Appeals "could cause the Trust Fund to be presently depleted in the amount of over $54,000,000 and potentially in an amount of $100,000,000" (Petition for Rehearing, p. 2)—a contention which is not made in the instant Petition, presumably because its premise that "5,000 coal miners could find themselves in the same legal and factual

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What, in effect, the Petitioners are now arguing is that without any regard for the actuarial soundness of the Fund they permitted a contingent liability to arise by permitting persons entitled to pensions to continue to work and to continue to make payments into the Fund to such a point that it was dangerous to meet such an obligation and thus they had to cut off this entire group from the benefits which others similarly situated have been or will be enjoying. In any event, even if we assume the validity of the Petitioners' assertion that drastic action had to be taken to safeguard the Fund, is there any reason why this group had to be deprived completely of benefits, rather than an across-the-board cut in benefits for all persons who were beneficiaries under the Fund, as was done in 1961.

position as the Appellant Kosty" (id. at p. 8) was demonstrated to be completely erroneous for many reasons.[5]

We submit that whether the Petitioners were or were not running an actuarially sound program is not here in issue, that the motivating circumstances underlying the Trustees' exercise of their discretionary powers need not be considered, that there is no equitable reason why the Respondent should be denied his pension so that others may continue to receive theirs, and that, in any event, if the

[5] Perhaps the most significant rebuttal was found in Petitioners' statement in its successful Motion to Dismiss the Class Action which Respondent initially instituted that "Plaintiff's alleged cause of action will, both as to facts and law, be completely different from any other person claiming to be entitled to a pension from this Fund."

Moreover, if "5,000 eligibles" were indeed involved, it is curious that not a single case, to Respondent's knowledge, has been instituted involving the instant issue, or that the Union itself did nothing to protect such a large segment of its membership from such a disastrous action as that taken by the Petitioners. Moreover, the change in the Resolution occurred some ten years ago, many of the miners who may be entitled to a pension under the decision of the Court of Appeals are now dead so that either there is no continuing liability on the part of the Fund or, indeed, there has been no liability for some years or, conceivably, there may be no liability at all since applications would not be filed, in any event, for some deceased miners.

In any event, there is no sound basis for assuming that anything like five thousand claimants are involved. During the fiscal year ending June 30, 1955, which is the second "fiscal year" following the change in the Resolution and, thus, is a year in which it could normally be expected that the greatest or second greatest number of persons affected by the change in the Resolution would have filed applications, there were only 406 cases in which denials were made because the applicants furnished no proof of twenty years of classified service in the preceding thirty years. Even in the 406 cases where the applicant furnished no proof of twenty years of classified service in the preceding thirty years, it is entirely conceivable that in many of those cases the change in the Resolution would have no impact since there would be a failure to prove twenty years of classified service in any event.

Petitioners were mistaken in their policies with respect to eligibility (in terms of the financial resources of the Fund), the solution for rectification of their mistake is not to be found in permitting them to engage in an arbitrary and capricious action whereby they determine that in a group of persons having the same qualifications some are "less entitled" than others.[6]

b. Remand to the District Court for the purpose of ascertaining Respondent's employment from 1906 to 1924, would have been unwarranted and meaningless since the "evidence of Respondent's employment from 1906 through 1924 was not only uncontradicted but the Trustees expressly admitted that they had no evidence to rebut it" (App. 12a),[7] and further, in view of Petitioners' answers (filed February 17, 1961) to questions 1 and 5 posed by Appellant's Interrogatories (filed on February 7, 1961) namely,

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[6] One of the basic assumptions indulged in by Petitioners in setting forth the alleged financial impact is that all of the benefits must perforce remain the same for those persons who have been declared eligible and who have been receiving benefits during all of these years. Thus the choice posed by the Petitioners is that if you give Respondent and the alleged class similarly situated all of the benefits received by the others, then the Fund would be depleted. There is nothing sacrosanct, we submit, in the quantum of benefits received by the beneficiaries, as the Petitioners themselves made quite evident in 1961 when monthly payments were reduced from $100 to $75. The choice in 1953 was not either to cut off Respondent and others or to bankrupt the Fund. At that time (as in 1961) the same choice of reduction of benefits across-the-board for all persons who were entitled to a pension could just as readily have been made.

[7] Petitioners now assert that the reason no evidence to rebut Appellant's employment from 1906 to 1924 was submitted was that they never checked this portion of the Respondent's record (Petition, p. 19). This statement is strange in view of the statement appearing in the Pretrial Order filed on January 5, 1962, wherein the "Ds further deny that P had twenty years of service in the coal industry *at any time*". (Emphasis supplied). This denial was in

that Petitioners had no information or evidence that the Respondent was not employed in the coal industry from 1906 through 1924 and that "according to information submitted [to Petitioners], Respondent was allegedly employed as a Loader during the period" (1906-1924). It is thus clear that remanding this matter "would serve no useful purpose", as the Court of Appeals noted, since any finding to the contrary would not only be unsupported by the record but, presumably, would be reversed on review.

Petitioners had ample opportunity to meet the issue of twenty years of service in the District Court and should not now be heard to say that they were denied an opportunity to submit pertinent evidence. There was ample reason for Petitioners to contradict Respondent's testimony of service from 1906 to 1924 since there was no assurance that their position concerning the validity of the change in the Resolution would be upheld. The request now for a remand constitutes nothing more than an attempt to retry this case on some kind of a "newly discovered evidence" theory when, in fact, such evidence was either available or, in fact, does not exist.

Finally, in connection with the 1906 to 1924 period, it seems plain to Respondent that the District Court, in effect, found that the Respondent had served twenty years of service in the coal industry when it concluded "at the time of the amendment of the eligibility rules, plaintiff was not eligible for a pension in that he had not retired from or ceased work in the bituminous coal industry as required

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addition to the assertion that the Respondent was not entitled to a pension because he had not completed twenty years within the thirty-year period immediately preceding his application for a pension. Thus, Petitioners, in denying that the Respondent had twenty years of service in the coal industry "*at any time*" either must have had evidence to that effect or it can now be concluded that no such evidence ever existed and that the current statement is inaccurate.

by the eligibility rules before amendment." Clearly, such a conclusion would not have been necessary and, indeed, could not have been reached if the twenty years of service requirement had not been met. In other words, the District Court appears to be stating that the ineligibility of Respondent was predicated upon his failure to retire or cease work and the requirement to retire or cease work only comes into play after the pensioner has reached the required age and has completed the required service.

The *Marconi* case, (*Marconi Wireless Tel. Co.* v. *Simon*, 246 U.S. 46), cited by the Petitioners, is inapplicable since it is not at all "similar", as Petitioners assert; *Marconi* involved a patent infringement, in the light of a construction to be accorded a Federal statute, and the state of the record in that case was such as to make remand necessary. As this Court stated, "we are of the opinion that under the case as made by the record, the duty of applying to the issues the true meaning of the statutes cannot with safety or with due regard to the rights of the parties be now performed . . ." (246 U.S. 56). In the instant case, the record was, as the Court of Appeals found, complete and "where the evidence of record points in only one direction, as here, justice does not require this Court to remand a case for the record to be reopened." (R. App. 12a).

c. Petitioners' assertion that the defenses of laches and statute of limitations were neither argued nor briefed is completely without substance. These defenses were very much in issue (as set forth in the pre-trial statement) and, indeed, were covered by the Petitioners, at least in oral argument, at the close of the Respondent's case. Counsel for Petitioners stated that he was not waiving the statute of limitations "but I am not going to argue it too strenuously, because *I am going to concentrate primarily on the question*

of laches." (Volume 3 of the Transcript, page 376) (Emphasis supplied). During his closing argument, as set forth in Volume 5 of the transcript, page 590, Counsel for Petitioners further stated "Now, your Honor, I am not going to argue the question of the statute of limitations, and I am not going to argue the question of laches. *I think I covered it as well as I could*" (Emphasis supplied). In the light of this record, we submit that the Court of Appeal's decision properly disposed of these defenses and that it is incomprehensible for the Petitioners to assert now that they were never argued.

The choice not to brief these defenses in its initial Brief in the Court of Appeals was certainly the Petitioners' but, in any event, they were briefed by Petitioners in their Petition for Rehearing *En Banc*, which the Court of Appeals unanimously rejected. At that time, Petitioners advanced to the Court their argument that an action for a pension is divisible into two parts (Petitioners' Brief, pages 21-22). Thus, the opportunity has been available to pose this theory and the Court's rejection of it unanimously should dispose of the matter finally.*

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* The instant action is plainly an equitable action and there is absolutely no reason whatsoever why Respondent should now be constrained to bring an action at law to receive monetary payment, as Petitioners apparently urge. Plainly, if several years from now the Trustees, for no reason whatsoever should discontinue payments to Respondent, then an action at law on a debt due would have to be instituted. But that is not the instant situation. We submit that an action to establish a right to a pension is equitable in nature and that the three-year Statute of Limitations has no application to an action equitable in nature. See cases cited in the Opinion of the Court below, and *Russell* v. *Todd*, 309 U.S. 280, 289, 291 (1940); also, *Cassell* v. *Taylor*, 243 F. 2nd 259, 100 U.S. App. DC 153 (1957)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 523

JOHN L. LEWIS, JOSEPHINE ROCHE AND HENRY G. SCHMIDT, TRUSTEES; UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Petitioners*,

v.

JOHN KOSTY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS IN REPLY

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ARGUMENT

The answers to respondent's contentions may be found in petitioners' brief, however, there are several misstatements and omissions in his opposition, which, if left unanswered, would fail to place the issues in their proper prospective.

1. Respondent objects to petitioners' use of a report of a Senate Subcommittee, the "Douglas Report,"[1] to demonstrate the economic necessity of the Trustees' action. Respondent had offered it in evidence at trial and it was rejected because of petitioners' objection (Brief for Respondent in Opposition, pg. 6). In point of fact, Respondent's Counsel in its direct examination of the Director-Trustee, Miss Josephine Roche, offered in evidence a sentence contained in that report to the effect that pensioners could file their applications with either Local Unions of the United Mine Workers of America or the Trust Fund (See Trial Transcript, Vol. III, pgs. 277-285). The Trial Court correctly pointed out that counsel could not use the document as a declaration against interest, as respondent desired, since it could not be determined who had made the statement which was incorporated in that Report. Furthermore, this proffer dealt with an aspect of the case below that respondent abandoned prior to appeal, to wit, the claim that Respondent had filed his application for a pension with a local union of United Mine Workers of America prior to the time of the change by the Trustees in requirements of eligibility for pensions.

In considering the *Douglas Report*, respondent argues that the reasons for the Trustees change of requirements of eligibility for pensions made without prior general notice of intent to make such changes, are irrelevant. Respondent fails to realize, that the criteria for judicial interference with the actions of the Trustees of this discretionary trust must be predicated

[1] Welfare and Pension Plans Investigation, Final Report submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended by S. Res. 200 and S. Res. 232 (84th Congress).

upon an *arbitrary* act by the Trustees (see opinion in the Court below, Appendix to Petition, pg. 8a). Petitioners contend, as was pointed out in the Douglas Report, that sound business judgment by the fiduciary Trustees compelled the change in requirements of eligibility in the manner in which it was done and, that this action was not arbitrary. Such report is clearly relevant and material in this regard.

2. In footnote 4, pgs. 6-7 of Respondent's Opposition, in setting forth his argument of equitableness, rather than arbitrariness, respondent errs in failing to state that pursuant to the Trust Indenture payments made to the Trustees, which constitute the trust res, are paid by those coal operators who, together with the United Mine Workers of America, a labor union, were settlors of the Trust.

3. At pages 11 and 12 of his Opposition, respondent refers to statements of counsel for petitioners at trial, with reference to the defenses of the statute of limitations and laches. These statements were made in connection with the claim of respondent, long since abandoned, that he had filed an application for a pension in December, 1952, prior to the change in requirements of eligibility for pensions. This contention, which the Trial Court rejected, was susceptible to being proven a complete falsehood by the testimony of several witnesses, who had died prior to the litigation. Had respondent pressed this claim within a reasonable time after the denial of his pension in 1952, the Trustees could have refuted his claim by calling these persons, now deceased, as witnesses.

4. Respondent's suggestion that there is no evidence to refute his employment from 1906 to 1923 is not wholly accurate (Respondent's Opposition, pgs. 9-10).

As pointed out in the Petition (p. 19) such evidence was not considered relevant to petitioners' defenses in the Trial Court. Nor did that Court in its view of the case, consider this subject in any fashion.

5. Finally, respondent labors under the impression that petitioners exhausted their judicial remedies when they filed their petition for rehearing before the Court of Appeals (see Opposition, page 5). The Court of Appeals, having decided issues not previously determined by the Trial Court, and with respect to certain defenses, not even having been briefed or argued, the matters contained in the petition for rehearing were, of necessity, raised for the first time. Proper procedures were followed in first presenting these matters in the petition for rehearing, prior to filing the petition for writ of certiorari in this Court.

CONCLUSION

For the reasons advanced in petitioners' petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, it is respectfully submitted that the same should be granted.

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